DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 1649-98
20 December 1999

[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 16 December 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the Director, Naval Council of Personnel Boards dated 29 April 1999, a copy of which is attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official

records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure

DEPARTMENT OF THE NAVY
NAVAL COUNCIL OF PERSONNEL BOARDS
BUILDING 36 WASHINGTON NAVY YARD
901 M STREET SE
WASHINGTON, DC 20374-5023

IN REPLY REFER TO
5420
Ser: 99-034
29 Apr 99

From: Director, Naval Council of Personnel Boards
To: Chairman, Board for Correction of Naval Records

Subj: COMMENTS AND RECOMMENDATION IN THE CASE OF FORMER [redacted]

Ref: (a) BCNR ltr JRE DN: 1649-98 dtd 2 Sep 98
(b) SECNAVINST 1850.4C

1. This responds to reference (a) for information to show whether or not Petitioner's discharge should be changed to a medical retirement vice discharge with severance pay. **We have determined that Petitioner's request warrants no change to the Physical Evaluation Board's (PEB) findings.**

2. The Petitioner's case history and medical records have been thoroughly reviewed in accordance with reference (b) and are returned. The following comments as well as our recommendation are provided below.

3. The available records suggest that Petitioner had suffered from relatively rare/isolated low back pain since circa 1987 with a full mechanical low back syndrome developing incident to a July 1995 missed step {while carrying boxes}. This chronic low back pain sufficiently impaired her fitness as to warrant the PEB finding as evidenced in part by numerous health record entries from January 1987 to February 1996.

4. Fibromyalgia was diagnosed in the process of evaluating the Chronic Low Back Syndrome due to the presence of the requisite symptoms and signs. However, there is insufficient evidence in the available records to establish that Petitioner's Fibromyalgia rendered her 'UNFIT' for duty. Both the Compensation and Pension Exam Report and Department of Veterans Affairs (DVA) Rating Decision contained in reference (a) made an assessment for Fibromyalgia; however, their findings only require service connection and VASRD compatibility to establish a rating. Nonetheless, a contributory role appears appropriate to acknowledge at this point, as was done by the Record Review Panel on 29 April 1997.

5. The fact that a service member's medical condition while on active duty was not determined to be a physical disability has

nothing to do with the DVA's jurisdiction over a case. In fact it should be noted that, as long as the DVA determines a condition (for which the DVA is currently evaluating the veteran) to be service-connected, the DVA can delete, add or change diagnoses made by the Service. The DVA can also increase or decrease the disability percentage rating as the condition worsens or improves. On the other hand, the determination made by the PEB, acting under Title 10 U.S. Code Chapter 61, reflects the member's condition only at the time of the member's separation. In this case, the DVA rating is based on several conditions the DVA has determined to be service-connected, but which were determined by the PEB to be not disabling with regard to active military service.

6. In summary, the Petitioner's records and documentation support the conclusion that she was properly separated by reason of physical disability, with a 10% rating. She was afforded every right of appeal to which she was entitled following the finding of the PEB's RRP; however, the Petitioner stated in writing that she accepted the finding of 10 percent disability. I find no evidence of prejudice, unfairness, or impropriety in the adjudication of Petitioner's case, and therefore recommend that her petition be denied.

J. D. KEHO
Acting